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No. 91-1281

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD M. POPKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether an act that is not otherwise unlawful violates 26 U.S.C. 7212(a) when it is corruptly committed for the purpose of obstructing or impeding, or endeavoring to obstruct or impede, the due administration of the internal revenue laws.

2. Whether a violation of 26 U.S.C. 7212(a) requires the use of force or threats of force directed against a particular government employee.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-34) is reported at 943 F.2d 1535.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1991. A petition for rehearing was denied on November 13, 1991. Pet. App. 35. The petition for a writ of certiorari was filed on February 6, 1992. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of corruptly endeavoring to obstruct or impede the due administration of the Internal

Revenue Code, in violation of 26 U.S.C. 7212(a).[1] Petitioner was sentenced to a term of imprisonment of a year and a day, and was ordered to pay restitution to the government in the amount of $6,755. Pet. App. 18-22.

1. In 1978, petitioner, who was a practicing attorney, assisted his client Stephen Musick in the preparation of a false income tax return. That return misrepresented the source and amount of Musick's 1977 income, which was approximately $250,000 and was derived from Musick's involvement in drug transactions.

Petitioner and Musick had no further contact until 1985, when Musick approached petitioner as part of a government sting operation and informed him that he had earned approximately $200,000 on cocaine deals while he was in prison for drug crimes. Pet. App. 20.[2] Musick told petitioner that he wanted to get into the construction and real estate business in California, but that he first had to legitimate the drug income he had earned in prison. Musick told petitioner that his money from the drug deals was being held by an entity called Mid-America Financial in an offshore account, and that he needed assistance in repatriating the money through a transaction that would disguise the source of the funds and reduce the taxes to be paid on them. *Ibid.*

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[1] Petitioner was charged in a three-count indictment with aiding and assisting in the preparation of false income tax returns, in violation of 26 U.S.C. 7206(2) (Counts 1 and 2), and with corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a) (Count 3). The jury returned verdicts of not guilty on Counts 1 and 2, and guilty on Count 3.

[2] After his involvement with petitioner in 1978, Musick pleaded guilty to cocaine distribution charges and was imprisoned. While he was serving his prison term, Musick provided information to federal agents concerning his 1978 dealings with petitioner. The agents subsequently asked Musick to participate in the sting operation. Pet. App. 20.

Petitioner suggested a complicated scheme to legitimate the drug money. First, petitioner would form a California Corporation for Musick. Musick would then sell stock in the new corporation to Mid-America Financial for $200,000, would report heavy losses in the new corporation and then repurchase the stock from Mid-America for $3,000 to $10,000. Petitioner cautioned Musick to comply with the formal requirements for running a corporation in order to maintain the proper corporate appearance. Later the same day, petitioner met with Musick and two undercover agents posing as representatives of Mid-America Financial. The parties discussed the formation of Musick's new corporation and methods of repatriating Musick's offshore funds. Pet. App. 20-21.

In April 1985, petitioner and Musick met with the two undercover agents at Mid-America's office in St. Louis. At the meeting, petitioner gave Musick personal tax returns for 1983 and 1984 that petitioner had prepared. Those returns showed gross income of $50,000 for each year. This sum was reported only as gross receipts or sales without any further indication of its source. Those returns were never filed. Pet. App. 21.[3]

After these meetings, petitioner set up the S. Musick Corporation in California, obtained a corporate seal, which petitioner mailed to Musick, and registered the corporation with the State of California. Petitioner billed Musick a total of $1,755 for costs associated with the formation of the corporation. That bill was paid by

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[3] Before the case was submitted to the jury, Count 3 of the indictment was amended to delete references to the tax returns, which were described in Counts 1 and 2. Therefore, the charge against petitioner in Count 3 was based solely on the allegation that he corruptly obstructed and impeded, and endeavored to obstruct and impede, the due administration of the internal revenue laws by creating a corporation for Musick for the purpose of hiding income and its source. Pet. App. 22.

Mid-America Financial. Petitioner also received $5,000 for the preparation of the two income tax returns. Pet. App. 21.

2. The court of appeals affirmed. Pet. App. 18-34. The court first rejected petitioner's argument that 26 U.S.C. 7212(a) requires the use of force or threats of force against a government agent. Pet. App. 23. The court held that the second clause of Section 7212(a), the clause under which petitioner had been charged, prohibited "any act that either obstructs or impedes or endeavors to obstruct or impede, the 'due administration' of the Internal Revenue Code." Pet. App. 26. The court further held that the second clause of Section 7212(a) does not require that the prohibited conduct be directed at any particular government agent. Pet. App. 26.

The court also rejected petitioner's contention that the creation of the corporation did not obstruct and was not intended to obstruct or impede the due administration of the Internal Revenue Code. The court found that the evidence was sufficient to show that petitioner created the corporation "for the purpose of enabling Musick to disguise the character of illegally earned income and to repatriate it." Pet. App. 28. The court found that petitioner acted corruptly "because at least one intent in creating the corporation was to secure an unlawful benefit for his client." *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 4-7) that his conviction violates due process because the formation of a corporation is not an inherently illegal activity and thus could not have violated Section 7212(a). He claims (Pet. 4-5) that an act done with the purpose of obstructing the due administration of the internal revenue laws does not violate Section 7212(a) if the act itself is not illegal. That claim has no merit.

Petitioner's position is contrary to the plain language of Section 7212(a). Section 7212, which is entitled "Attempts to interfere with administration of internal revenue laws," provides in part:

> (a) Corrupt or Forcible Interference.
>
> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title *or in any other way corruptly* or by force or threats of force (including any threatening letter or communication) *obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title*, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. * * *

26 U.S.C. 7212(a) (emphasis added). The emphasized language defines petitioner's offense and contains no requirement that the underlying act itself be otherwise illegal. To the contrary, that language reaches the conduct of any person who "in any * * * way corruptly" obstructs or impedes, or endeavors to obstruct or impede, the due administration of the tax laws. An otherwise lawful act is therefore illegal when it is the means of corruptly obstructing or attempting to obstruct the administration of the tax laws.[4]

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[4] There is nothing novel about this principle. For example, there is nothing inherently illegal about mailing a letter, but it is illegal to use the mails for fraudulent ends. See 18 U.S.C. 1341. In short, it is clear that an inherently legal act can be made illegal if it is done with criminal intent.

Petitioner's reliance on *United States* v. *Hylton*, 710 F.2d 1106 (5th Cir. 1983), is misplaced. In *Hylton*, the Fifth Circuit held that where a defendant's actions "represent[ed] a legitimate and protected exercise of her [First Amendment] right to petition for the redress of grievances," she could not be convicted of violating Section 7212 based upon her filing of nonfraudulent trespass complaints against IRS agents. 710 F.2d at 1111. Unlike the defendant in *Hylton*, petitioner cannot claim that he had a constitutionally protected right to create a corporation so that Musick could fraudulently repatriate his money, disguise its character, and pay "less than full income taxes" (Pet. App. 20). See *United States* v. *Reeves*, 782 F.2d 1323, 1326 (5th Cir.) (filing of frivolous common law liens with intent to secure improper benefits or advantages prohibited under Section 7212(a) and did not constitute petition for redress), cert. denied, 479 U.S. 837 (1986).

2. Petitioner also contends (Pet. 7-17) that the court of appeals erred in holding that Section 7212(a) is not limited to cases involving the use of force or threats of force directed against a government employee.

a. On its face, Section 7212(a) prohibits efforts to impede the due administration of the tax laws both through the corrupt use of force or threats of force against federal officers or agents, or through corrupt efforts to accomplish the same end "in any other way." The first clause of the statute makes it a crime to endeavor, corruptly or by force or threats of force, to "intimidate or impede any officer or employee of the United States acting in an official capacity under [the Internal Revenue Code]." The second clause, under which petitioner was charged, makes it unlawful for any person "in any other way corruptly or by force or threats of force * * * [to] obstruct[] or impede[], or [to] endeavor[] to obstruct or impede" the administration of the tax laws. The two

clauses, which are separated by the word "or," plainly state alternative means of violating the statute. Only the first clause requires proof of the use of force or threats of force against a government agent. Under the second, and broader, clause, any corrupt endeavor to obstruct or impede the administration of the tax laws is illegal, regardless of whether it involves force or a threat of force against any federal officer or employee.

b. Contrary to petitioner's assertion, the legislative history of the statute does not command a reading that is contrary to its plain language. Indeed, the legislative history supports application of Section 7212(a) to conduct not involving force or the threat of force against an employee or agent of the IRS.

Congress enacted the current version of Section 7212(a) as part of the Internal Revenue Code of 1954. The statute was patterned after 18 U.S.C. 111, which prohibits forcible assault on a federal employee engaged in the performance of his duties, but it was broader "in that it covers threats of force (including any threatening letter or communication) or corrupt solicitation." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A427 (1954); see also S. Rep. No. 1622, 83d Cong., 2d Sess. 604 (1954). See *United States* v. *Martin*, 747 F.2d 1404, 1408-1409 (11th Cir. 1984) (reviewing legislative history of Section 7212); *United States* v. *Walker*, 514 F. Supp. 294, 304-305 (E.D. La. 1981) (same). In noting that the statute covers corrupt solicitation, the House Report clearly indicates that Congress intended the statute to reach conduct not involving force or the threat of force.

c. The case law also does not support petitioner's position. Petitioner asserts (Pet. 12-17) that the courts have applied Section 7212 only to cases that involve the use of force or threats of force.[5] Even if that were cor-

[5] Petitioner also relies (Pet. 11) on the fact that in *United States* v. *Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974),

rect, it would "prove[] nothing," as the court of appeals correctly noted. Pet. App. 26. This Court pointed out in *Parr* v. *United States*, 363 U.S. 370, 391 (1960), that "the fact [that] there is no reported decision involving similar factual circumstances or legal theories is not determinative." On the contrary, "[w]hat is determinative is the clear language of the statute," which "conspicuously omits the requirement that [the] conduct be directed at 'an officer or employee of the United States Government.' " Pet. App. 26.

In any event, contrary to petitioner's assertion (Pet. 12), several courts have applied Section 7212(a) to cases not involving the use of force or threats of force against a government employee. See *United States* v. *Yagow*, 953 F.2d 423 (8th Cir. 1992) (sending false IRS forms 1099 to individuals and filing false forms 1099 with the IRS); *United States* v. *Reeves*, 782 F.2d at 1326 (filing frivolous common law liens); *United States* v. *Williams*, 644 F.2d 696, 701 (8th Cir.) (assisting in the preparation and filing of false W-4 forms), cert. denied, 454 U.S. 841 (1981); *United States* v. *Martin*, 747 F.2d at 1408-1410 (filing false complaints).

As one court has explained, Section 7212 prohibits all efforts to impede "the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax

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the government argued that Section 7212 "apparently applies only to acts or threats of physical violence." 386 F. Supp. at 1054-1055. Petitioner's reliance is misplaced. First, the district court in that case properly rejected the argument as unpersuasive. The court thought that Section 7212 clearly applied to the defendant's submission "during an audit of a false, fictitious and back-dated document." 386 F. Supp. at 1050, 1056. Moreover, the government " 'is not disqualified from changing its mind' concerning the construction of a statute." *Garcia* v. *United States*, 469 U.S. 70, 79 (1984) (quoting *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978)).

records." *United States* v. *Reeves*, 752 F.2d 995, 998 (5th Cir), cert. denied, 474 U.S. 834 (1985); see also *United States* v. *Yagow*, 953 F.2d at 426-427. By establishing a corporation in an attempt to impede the collection of Musick's taxes and to impede the auditing of Musick's records, petitioner violated Section 7212(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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